IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
December 12, 2006 Session

STATE OF TENNESSEE v. KENNETH THREALKILL

Direct Appeal from the Criminal Court for Davidson County
Nos. 2004-D-2817, 2004-D-2857 Steve R. Dozier, Judge

No. M2006-00555-CCA-R3-CD - Filed June 6, 2007

The appellant, Kenneth Threalkill, pled guilty in the Davidson County Criminal Court to one count of aggravated robbery, four counts of robbery, and one count of aggravated assault, and he received a total effective sentence of twenty-one years incarceration in the Tennessee Department of Correction. On appeal, the appellant challenges the trial court's imposition of consecutive sentencing. Upon our review of the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

Rayburn McGowan, Jr., Nashville, Tennessee, for the appellant, Kenneth Threalkill.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Pamela Sue Anderson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

In October 2004, the Davidson County Grand Jury returned indictment number 2004-D-2817, charging the appellant on count one with the robbery of Walter L. Jacks, and on count two with the aggravated robbery of Vicki Hackler. Also, in October 2004, the Davidson County Grand Jury returned indictment number 2004-D-2857 against the appellant. Count one of that indictment charged the appellant with the aggravated robbery of Kady E. Clifton, count two charged the appellant with the aggravated robbery of Matthew Gregory, count three charged the appellant with the aggravated robbery of Debbie Anthony, count four charged the appellant with the aggravated robbery of Angela Boerste, count five charged the appellant with the attempted aggravated robbery

of Eddie T. Wheatley, and count six charged the appellant with the aggravated assault of Oscar Carter.

On November 30, 2005, the appellant pled guilty to two counts of robbery on indictment 2004-D-2817. He also pled guilty to one count of aggravated robbery, two counts of robbery, and one count of aggravated assault on indictment number 2004-D-2857, with the remaining counts on that indictment dismissed. The plea agreement did not include a sentencing recommendation.

As to count one of indictment number 2004-D-2857, the State's proof was that on the afternoon of July 10, 2004, the appellant entered an Executive Cleaners on Bandywood Drive in Nashville. He asked the clerk, Kady Clifton, for change. While she had the money drawer open, the appellant pulled a silver handgun and demanded money. She gave him the money, and he fled. Police found the appellant's fingerprints at the scene, and the victim identified the appellant from a photographic lineup as the perpetrator.

The State's proof regarding count two of that indictment was that about noon on July 12, 2004, the appellant entered a Rent-A-Center on Nolensville Road and grabbed a computer monitor. As the appellant was attempting to leave with the monitor, an employee of the store, Matthew Gregory, confronted him. The appellant pulled a gun and told Gregory to stand back "if he did not want to get hurt." During a subsequent interview with police, the appellant admitted taking the computer monitor.

The State's proof regarding count three of indictment number 2004-D-2857 was that at approximately 12:15 p.m. on July 16, 2004, the appellant entered a Mapco store on Murfreesboro Pike and asked the clerk, Debbie Anthony, about some DVDs. Anthony did not pass the DVDs to the appellant, fearing he would take them without paying. The appellant lifted the walk-through counter door, patted his pocket, and said, "You don't want none of what's in my pocket." The appellant then took two DVD players and cash from the register. He left and entered the passenger side of a dark blue Toyota. On a later date, the appellant admitted taking the DVD players.

The State's proof regarding count six of 2004-D-2857 was that around 4:50 p.m. on July 22, 2004, the appellant entered Rent-A-Center on Nolensville Road, cut a laptop security cable, ripped a lock from a laptop, and ran to escape. When an employee, Eddie T. Wheatley, attempted to stop the appellant, the appellant pulled a silver revolver and threatened to use it. Another person in the store, Oscar Carter, realized the gun was fake. The men held the appellant down to detain him. The appellant pulled a pair of scissors and stabbed both men, causing non-life-threatening injuries. The appellant later admitted to police that he tried to steal the computer for "dope dealers." However, he denied having scissors or stabbing the victims.

Regarding count one of indictment 2004-D-2817, the State's proof was that on July 13, 2004, the appellant entered a Mapco store on Dickerson Road. He brought a candy bar to the counter and asked the clerk, Walter L. Jacks, "What are you waiting for? You don't want me to get ugly, do

you?" Jacks opened the cash register and stepped away. The appellant took a little over eighty dollars in cash and left the store.

The State's proof regarding count two of that indictment was that on July 16, 2004, the appellant entered a Mapco store and approached the clerk, Vickie Hackler. The appellant displayed a gun and demanded money. Hackler told the appellant that there was no money, whereupon the appellant went behind the counter and took a DVD player. The appellant later admitted taking the DVD player.

At the sentencing hearing, the State submitted the appellant's presentence report which showed that the appellant had at least four prior felony convictions, including robbery, attempted robbery, and felony possession of cocaine. The appellant also had seventeen prior misdemeanor convictions, including possession of drugs, possession of drug paraphernalia, theft, public intoxication, criminal impersonation, and driving on a revoked licence. The parties agreed that the appellant was a Range II multiple offender.

The appellant testified on his own behalf. He said that he was forty-one years old and had started experimenting with marijuana when he was nine years old. The appellant continued using marijuana throughout high school and began using cocaine while attending college. The appellant acknowledged that although he had a full academic scholarship to attend college, using marijuana "kinda (sic) sidetracked my college career."

The appellant stated that he had attended four treatment programs for his substance abuse problem. The appellant related that at one point he was "clean" for three years, attended Narcotics Anonymous meetings, and got his life in order. Thereafter, the appellant relapsed and began using drugs. He stated that every time he relapsed "things just got much more severe." The appellant conceded that one of the biggest mistakes of his life was not taking the opportunity to participate in a "halfway-house situation" for treatment of his substance abuse problem.

The appellant stated that his family was well-educated and supportive. However, cocaine had a "[t]errible effect" on his life. He said that to support his addiction, he frequently turned to shoplifting. He acknowledged that he had probably committed twenty to thirty shoplifting offenses for which he was never caught.

The appellant said that he was taking responsibility for the instant offenses. He had been released on probation for six weeks before committing the instant offenses to support his drug addiction. The appellant denied taking scissors to the Rent-A-Center, saying that he found the scissors on the floor. The appellant also denied cutting the men, contending that when they choked him, he grabbed the scissors to protect himself. He claimed that the men grabbed the scissors, cutting themselves. The appellant said that he did not see any blood from their injuries.

The appellant admitted that he had previously been incarcerated. He acknowledged that he had been on probation previously and had violated the terms of his release by failing a drug screen.

During his confinement, the appellant completed a Moral Recognizance Therapy Program, and he was diagnosed with bipolar disorder. The appellant had an adverse reaction to the medication prescribed for his disorder, so he stopped using the prescription medication and began self-medicating with marijuana and cocaine.

The appellant stated that at the time of the sentencing hearing, he had been under a doctor's care for nineteen months. The appellant said he had begun taking Wellbutrin for his bipolar disorder, and the medication helped to stabilize his moods. Months before the sentencing hearing, both the appellant's father and grandfather passed away. He said that the medication had helped him deal with the loss.

The appellant stated that while in confinement, he was trying to stay physically active and was studying the Bible. The appellant said that studying the Bible helped provide the strength he needed to deal with his "issues." The appellant said that he was in the process of obtaining an associates degree in paralegal studies through a program provided to inmates. The appellant stated that he had acted like a "spoiled brat." He acknowledged that he needed to deal with his addiction and accept responsibility for his actions.

Mickey Leona Threalkill, the appellant's mother, testified that she had not always been aware of the appellant's substance abuse problems. She said that there were no drugs in her household, but she acknowledged that "when a person gets to be an adult, they might have slick ways of doing things."

Mrs. Threalkill said that when the appellant was four years old, he was injured by a fall through a plate-glass door. Six months later, she noticed the appellant having "night screams and terrors." Later, when the screaming went away, Mrs. Threalkill learned that the appellant was self-medicating with marijuana. She believed that the appellant had suffered from post-traumatic stress disorder.

Mrs. Threalkill stated that when the appellant was released from confinement prior to the instant offenses, he did not stay with her. Instead, the appellant stayed with a friend whom Mrs. Threalkill believed to be a "bad influence." Mrs. Threalkill said that she was "baffled" by the appellant's conduct, and she thought that the appellant's mental issues needed to be addressed.

At the conclusion of the sentencing hearing, the trial court sentenced the appellant as a Range II multiple offender to seven years each for the three robbery offenses, fourteen years for the aggravated robbery conviction, and six years for the aggravated assault conviction. The court ordered that the fourteen-year sentence be served consecutively to one of the seven-year robbery sentences, with the remaining sentences to be served concurrently, for a total effective sentence of twenty-one years. On appeal, the appellant challenges the trial court's imposition of consecutive sentencing.

II. Analysis

Appellate review of the length, range or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d) (2003). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2006); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentence(s). See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

In his brief, the appellant asserts that the "Trial Court erred by sentencing the Appellant to a total effective sentence of twenty[-]one (21) years through the use of consecutive sentencing." The appellant complains about the imposition of consecutive sentencing on two separate bases. First, the appellant contends that the trial court incorrectly considered enhancement and mitigating factors when determining the aggregate length of his sentence. Second, the appellant argues that the trial court improperly applied consecutive sentencing according to Tennessee Code Annotated section 40-35-115 (2006) by failing "to find on the record that he was a 'dangerous offender'" and by "finding that his criminal record was extensive."

First, we note that we have examined the enhancement and mitigating factors applied by the trial court, and we conclude that the trial court did not err in the length of the sentences imposed based upon the application of those factors.

Secondly, we note that "[w]hether sentences are to be served concurrently or consecutively is a matter addressed to the sound discretion of the trial court." State v. Adams, 973 S.W.2d 224, 230-31 (Tenn. Crim. App. 1997). Tennessee Code Annotated section 40-35-115(b) contains the discretionary criteria for imposing consecutive sentencing. See also State v. Wilkerson, 905 S.W.2d 933, 936 (Tenn. 1995). The trial court may impose consecutive sentencing upon finding the existence of any one of the following criteria:

> (1) The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
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> (2) The defendant is an offender whose record of criminal activity is extensive;
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> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an

> investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
>
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
>
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
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> (6) The defendant is sentenced for an offense committed while on probation; or
>
> (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b)(1)-(7).

The appellant complains that the trial court failed to find him to be a dangerous offender. In the instant case, the trial court did not impose consecutive sentencing based upon the appellant being a dangerous offender. However, Tennessee law clearly reflects that a court need find only one of the discretionary criteria in order to impose consecutive sentencing; a finding that the offender is a dangerous offender is not required if another criteria for imposing consecutive sentencing exists. State v. Alder, 71 S.W.3d 299, 307 (Tenn. Crim. App. 2001).

In the instant case, the trial court imposed consecutive sentencing after finding that the appellant is an offender whose record of criminal activity is extensive. See Tenn. Code Ann. § 40-35-115(2). The record reflects that the appellant has a history of at least four felony convictions and seventeen misdemeanor convictions, warranting the trial court's finding that the appellant's criminal history is extensive. The existence of an extensive criminal history is enough, standing alone, to support the imposition of consecutive sentencing. Adams, 973 S.W.2d at 231. The appellant also appears to contest the trial court's failure to find that the sentences were necessary in order to protect the public from the appellant's further misconduct or that'the terms are reasonably related to the severity of the offenses. However, a trial court must find the existence of these so-called Wilkerson factors only if imposing consecutive sentencing upon finding that the appellant is a dangerous offender, a finding the appellant acknowledges the trial court did not make. State v. Lane, 3 S.W.3d 456, 461 (Tenn. 1999). Moreover, we note that the appellant's contention that he committed many

of the foregoing crimes as a result of his addiction is lamentable but is not a reason to find that the trial court erred in imposing consecutive sentencing.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgments of the trial court.

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NORMA McGEE OGLE, JUDGE